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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation	))))	CC Docket No. 92-135

PETITION FOR PARTIAL RECONSIDERATION AND CLARIFICATION

Martin T. McCue
Vice President and
General Counsel
United States Telephone
Association
900 19th St., N.W.
Suite 800
Washington, D.C. 20006
(202) 835-3114

Lawrence P. Keller
Cathey, Hutton & Assoc., Inc.
3300 Holcomb Bridge Rd.
Suite 286
Norcross, GA 30092

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SUMMARY

USTA seeks reconsideration of certain aspects of the Report and Order in this proceeding in order to enhance the public interest benefits that the Commission's regulatory reform policies are intended to achieve. Specifically, the Commission should reconsider its decision to require 12-month data in support of subsequent tariff filings under the optional incentive regulation (OIR) plan and, instead, should require data covering the period since the last tariff filing. Twelve-month data is simply not representative of the 2-year OIR tariff period.

Further, the Commission should permit LECs exiting the OIR plan to participate in the NECA traffic-sensitive pool. No legitimate purpose is served by differentiating between OIR plan participants and non-participants when it comes to voluntary membership in that pool. The Commission should also shorten its 2-year notice period for leaving the OIR plan.

Additionally, the Commission should reconsider its decision to require infrastructure reports from OIR plan participants. Such reports are not required by voluntary price cap carriers, and the requirement runs counter to the Commission's finding in the price cap proceeding that infrastructure reporting would be an unreasonable burden on all but the largest LECs.

Finally, the Commission should reconsider its decision to permit streamlined review for new service offerings only where

the price of the new service is at or below that of a neighboring price cap LEC. In instances where the service is not offered by a neighboring price cap LEC, the Commission should allow streamlined review so long as the price for the new service is no higher than the price charged by the geographically closest price cap carrier that offers a like service.

Regarding issues for clarification, the Commission should clarify that the "heavy burden" test for mid-course OIR tariff filings applies only to corrections to the authorized rate of return. It does not apply to corrections to the lower earnings band. The Commission should also clarify that carriers which elect the OIR plan effective January 1, 1994, may exit the plan after two tariff periods.

Section 61.50 of the rules should specifically state that LECs under the OIR plan can recognize exogenous cost changes, as permitted by the Report & Order. The carrier common line demand adjustment in both Sections 61.39 and 61.50 should be changed to accurately reflect the Commission's intent, and the rules governing baseline tariff filings should make clear that carriers, which are not in a NECA pool, may file on an annual basis. Finally, Section 61.50 should provide for end-user common line charges that are based on the same historical data used to support such rates under Section 61.39.

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PETITION FOR PARTIAL RECONSIDERATION AND CLARIFICATION

The United States Telephone Association (USTA),[1] pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, hereby petitions for partial reconsideration and clarification of certain aspects of the Commission's Report & Order (R&O), FCC No. 93-253, released June 11, 1993, in the above-captioned proceeding.[2]

I. INTRODUCTION

The R&O adopts a system of incentive-based regulatory alternatives for those small and mid-sized local exchange carriers (LECs) that are not subject to price cap regulation.[3] Specifically, the Commission has established a range of regulatory options that are more attuned to the

[1] USTA is the principal trade association of the exchange carrier industry. Its membership of approximately 1,100 local telephone companies represents over 98% of telephone company-provided local access lines.

[2] This proceeding was initiated by a Notice of Proposed Rulemaking (NPRM), FCC 92-258, released July 17, 1992. A summary of the R&O and the accompanying rules appear in 58 Fed. Reg. 36145 (July 6, 1993).

[3] See 47 C.F.R. §§ 61.41-61.49.

diverse needs of these carriers than the price cap system. These options include an incentive regulatory plan (Optional Incentive Regulation or OIR), expansion of the Section 61.39[4] tariff filing procedures (relying on historical data) to include common line rates, and retention of the existing "baseline" tariff filing procedures under Section 61.38[5] that allows carriers, including those in the National Exchange Carrier Association (NECA) pools, to continue to file tariffs based on prospective data.[6]

USTA has been an active participant throughout this proceeding. In addition to submitting comments and reply comments, USTA met with Commission staff on numerous occasions, both prior to and after the start of this proceeding, with the objective of fashioning a set of regulatory reform initiatives that would achieve important benefits for LECs, the Commission's administrative processes and, most importantly, the LECs' customers.

USTA believes that the regulatory scheme adopted in the R&O substantially meets this objective and constitutes a

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[4] 47 C.F.R. § 61.39.

[5] 47 C.F.R. § 61.38.

[6] Non-pooled LECs will, for the first time, have the option to file either annual or biennial tariffs under Section 61.38. See R&O, ¶ 102.

major step toward bringing the advantages of incentive-based regulation to other than the largest LECs. For this reason, USTA is not seeking reconsideration of any of the fundamental features of the Commission's plan. Instead, USTA requests that the Commission reconsider certain limited aspects of its plan, as discussed below, in order to enhance the public interest benefits that the plan is designed to achieve. USTA also seeks clarification where the wording of the R&O, or the accompanying rules, could potentially raise questions regarding the proper interpretation or implementation of the Commission's regulatory reform policies.

II. DISCUSSION

A. ISSUES FOR RECONSIDERATION

1. Subsequent Tariff Filings Under the OIR Plan Should Be Based on Data Covering the Period Since the Last Filing.

The R&O adopted the NPRM's proposal to base a carrier's first OIR plan tariff filing on historical cost of service and demand studies for the most recent 12-month period. (R&O, ¶ 43) The R&O, however, departs from the NPRM's proposal to base subsequent filings "on similar cost and demand information for all elements for the period since the carrier's last filing"[7] and, instead, requires that subsequent filings be based "on the most recent 12-month period." (R&O, ¶ 43)[8] Although (as far as USTA can determine) no party to this proceeding argued that 12-month data should be utilized for subsequent tariff filings, the Commission states that "basing all filings on carriers' most recent 12-month period provides the most accurate data and provides consistency among data submission by LECs, facilitating analysis, review, and monitoring." (R&O, ¶ 43)

The Commission's justification for requiring 12-month data in support of subsequent OIR tariff filings is misplaced. Here, the "most accurate data" is the most complete data, i.e., the carrier's book data since the last tariff filing. Twelve-month data is simply not representative of the 2-year OIR tariff period. As such, 12-month data is an inferior source for tariff review, and is less suitable than 24-month data for use in the Commission's monitoring efforts. Moreover, 24-month data is

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[7] NPRM, ¶ 13.

[8] USTA notes that amended Section 61.3(e) of the rules defines the tariff "base period" for "carriers regulated under Section 61.50" governing the OIR plan as "the 24-month period ending six months prior to the effective date of biennial optional incentive plan tariffs." R&O, App. B, Section 61.3(e). Section 61.50, however, makes no reference to "base period" and, in any event, the Section 61.3(e) base period definition is contradicted by the express wording of ¶ 43 of the R&O.

necessary to obtain the full effect of the self-correction feature of the OIR plan under which carriers retarget to the authorized rate of return at the start of each 24-month subsequent tariff period.

The 12-month data requirement is also inconsistent with the requirements of Section 61.39, both the existing and newly amended versions, at least as they apply to traffic sensitive rates.[9] Section 61.39, which like section 61.50 provides for historical-based tariff filings, requires data since the last 24-month tariff filing, and there has never been any suggestion that such data is inaccurate or that the 24-month data period has made it difficult for the Commission to analyze, review or monitor LEC tariff submissions.

For these reasons, the Commission should reconsider its decision and adopt the NPRM's proposal that subsequent period tariff filings under the OIR plan be based on cost and demand data covering the period since the last tariff filing.

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[9] See 47 C.F.R. § 61.39(b)(1)(ii), and R&O, App. B, § 61.39(b)(1)(ii).

2. LECs Exiting the OIR Plan Should Be Permitted to Participate in the NECA Traffic Sensitive Pool.

The Commission states that a LEC leaving the OIR plan after a minimum two tariff periods "may not return to the NECA pools and must maintain its own tariffs under Section 61.38 of our rules, or become subject to price cap regulation." (R&O, ¶ 71) These restrictions are purportedly designed to limit "opportunities for short term profits through switching between different regulatory plans." (Id.)

USTA believes that the Commission's plan to prohibit entry or reentry into the NECA traffic sensitive pool is unreasonably harsh. The NECA traffic sensitive pool is entirely voluntary for non-price cap companies, and LECs have always been able to enter, leave, and reenter the pool without restriction. In view of the two tariff period minimum and other plan safeguards, no rational purpose is served by differentiating between OIR plan participants and non-participants when it comes to voluntary membership in the NECA traffic sensitive pool.

Further, the Commission needs to provide sufficient inducements (including plan exit conditions) for LECs to opt for the OIR plan. Otherwise, the public will not realize the plan's substantial incentive-based benefits. By prohibiting entry or reentry into the NECA traffic sensitive pool by former OIR plan participants, the Commission has added a condition which could discourage some carriers from electing the plan, but which adds little to the safeguards already in place. For these reasons, the Commission should reconsider its decision and permit LECs exiting the OIR plan to participate in the NECA traffic sensitive pool.

3. **The Two-Year Notice Period for Exiting the OIR Plan is Excessive.**

The Commission states that carriers seeking to exit the OIR plan must provide the Commission with 2-years' notice of their intent to do so. (R&O, ¶ 70) The Commission believes that "adequate notice of the carriers intent to leave the plan will provide stronger protection against abuse." (Id.)

USTA does not see how a 2-year notice period for leaving the OIR plan will further the Commission's objectives, or otherwise add to the safeguards that are already in place.[10] Even if it did, there are several good reasons why a shorter notice period would be more appropriate for the OIR plan.

[10] The OIR plan has several significant safeguards including a 4-year minimum plan participation period, and a requirement that a carrier cannot reenter the plan for 4 years after leaving OIR. See R&O, App. B, § 61.50(d).

First, a carrier which elects OIR would, during its initial 4-year term, be required to make its exit decision based on substantially less than 2 years of operating results under the plan. This is so because complete data for the second year would not be available until after the close of the second year.[11] A LEC which bases its decision on such a short period might decide to exit the OIR plan because of poor first year results when a longer period prior to notice could show more favorable results, thus encouraging the carrier to stay in the plan to the long-term benefit of its subscribers.[12]

Of course, a LEC can wait until it has sufficient experience under the OIR plan before it makes its exit decision and gives the 2-year notice. As a practical matter, however, this would require the carrier to stay

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[11] Carriers which elect OIR participation effective January 1, 1994, would be at an even greater disadvantage since, presumably, they would have participated under the plan for only 18 months before they are required to make their exit decision. (See Section II.B.2 below concerning clarification of the OIR plan election requirements for carriers beginning the plan on January 1, 1994.)

[12] The 2-year notice period could also cause an OIR plan LEC to forego election of price caps, which is a "higher level" of incentive-based regulation. As a point of clarification, USTA notes that while ¶ 71 of the R&O permits carriers that leave the OIR plan to "become subject to price cap regulation," price cap election is not an option under new rule Section 61.50(d). See R&O, App. B, § 61.50(d). USTA requests that the Commission correct the rule so that it conforms to the R&O.

under the plan (at least initially) for a minimum of 6 years, or 3 tariff periods, 50% longer than the two period minimum that the Commission has decided is necessary to achieve its objectives. (See R&O, ¶ 70)

USTA submits that a 2-year notice requirement serves no purpose other than to make it difficult, if not impossible, for a carrier to decide whether to leave the plan after the initial two tariff periods. Certainly, a 2-year notice period is not needed for either the Commission or NECA to prepare or otherwise make arrangements for the departure of a LEC from the OIR plan. Moreover, USTA is unaware of any notice period as long as 2 years under the Commission's rules governing the regulation of communications common carriers.

Finally, the Commission gave no indication in the NPRM that it was considering such a lengthy notice period. (See NPRM, ¶ 26) Nor was there any reason for parties to raise the issue in their comments since one would reasonably expect that the notice period for exiting the plan would not be any different than the 90-day filing period proposed for initial and renewal OIR tariffs. (See NPRM, App. A, § 61.58(e)(1)) If the Commission had given notice in the NPRM that it was considering an extended notice period for exiting the OIR plan, the record would have certainly reflected the above-described problems inherent in such a proposal.

For these reasons, the Commission should reconsider its decision to impose a 2-year notice requirement on LECs seeking to exit the OIR plan. USTA recommends that the Commission adopt a 90-day notice period consistent with the renewal tariff notice period. (See R&O, App. B, § 61.58(e)(1))

4. The Commission Should Eliminate the Infrastructure Reporting Requirements for OIR Plan Participants.

The Commission requires OIR plan carriers to submit annual infrastructure reports on Form 43-07 in the same manner as price cap LECs. (R&O, ¶ 84) The Commission believes that annual infrastructure reporting is not burdensome, even for smaller carriers. (Id.)

USTA believes that the maintenance and development of a sound telecommunications infrastructure is essential to the economic well-being of our country. The Commission's decision to require annual infrastructure reports for OIR LECs, however, is inconsistent with its well-reasoned conclusion in the price cap proceeding that infrastructure reports need not be filed by carriers who voluntarily participate under price caps.[13] The Commission stated that it was less concerned over infrastructure reporting for the voluntary price cap LECs, because "infrastructure monitoring of the largest eight LECs will provide a good indication of the general state of the infrastructure nationwide."[14] The Commission was "also reluctant to create reporting requirements that might be more burdensome for smaller carriers, and might preclude their participation in price cap regulation."[15]

The Commission provides no rationale for its disparate treatment of voluntary price cap LECs and carriers who voluntarily elect OIR. Nor does the Commission explain why infrastructure reporting is necessary for OIR carriers when it found that infrastructure reporting by the larger voluntary price cap LECs would provide little marginal benefit over the infrastructure information received from the mandatory price cap LECs. Finally, the Commission does not offer any reason why it now believes that infrastructure reporting would not be a burden to small carriers when just

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[13] See Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786, 6829, n. 479 (1990) (Second Report and Order), modified on recon., 6 FCC Rcd 2637 (1991), petitions for further recon. dismissed, 6 FCC Rcd 7482 (1991).

[14] Id.

[15] Id.

a short time ago it considered the same infrastructure reporting to be such a burden as to discourage much larger LECs from participating under price cap regulation.

In sum, the Commission's requirement that OIR plan carriers submit the same infrastructure reports as the mandatory price cap LECs is arbitrary when viewed in light of the Commission's decision to exempt voluntary price cap carriers from these same reporting requirements. Accordingly, the Commission should reconsider its decision and eliminate the infrastructure reporting requirements for carriers that elect the OIR plan.

5. Streamlined Regulation of a New Service Should Be Available Even Where the Service Is Not Offered by a Neighboring Price Cap LEC.

The Commission states that "carriers electing the optional incentive plan may introduce any new service on a streamlined basis. . ., so long as the price of the new service is at or below that of any neighboring price cap LEC." (R&O, ¶ 77)[16] Where a neighboring price cap LEC does not offer a like service, streamlined review is not available and the new service must be cost-supported using prospective data. (Id. at ¶ 77)

[16] Streamlined regulation of new services is also available for Section 61.39 filing carriers under the same conditions. Id. at ¶ 95.

USTA recognizes that a primary reason for allowing streamlined review of a new service offering by an OIR or Section 61.39 carrier is to permit the carrier to respond quickly to the introduction of a new service by a neighboring larger LEC. The Commission's rule is clearly useful in this situation. This circumstance, however, is not the only one in which an OIR or Section 61.39 LEC could offer a new service. There may be occasions where a carrier would like to introduce a new service but the service is not offered by a neighboring price cap LEC, or the carrier is not contiguous with a price cap carrier. In these circumstances, the public interest would be served by procedures which facilitate the rapid introduction of new services. Indeed, it would be contrary to the Commission's public policy objectivies to impose unnecessary burdens that could frustrate new service implementation. For these reasons, USTA requests that the Commission reconsider its decision and permit new service introduction on a streamlined basis (for both OIR and Section 61.39 carriers) where the service is not offered by a neighboring price cap LEC, so long as the price for the new service is no higher than the price charged by the geographically closest price cap carrier that offers a like service.

B. ISSUES FOR CLARIFICATION

1. The Commission Should Clarify That the "Heavy Burden" Test for Mid-Course OIR Tariff Filings Does Not Apply to Corrections to the Lower Earning Band.

The Commission states that if a LEC makes a showing that the OIR plan has caused its rates to fall below the lower limit of the OIR earnings zone (0.75% below the prescribed rate of return), and this trend is likely to continue through the 2-year rate period, the LEC may adjust its rates upward to yield the lower earnings limit. (R&O, ¶ 23) The Commission also states that a LEC can request rate adjustments targeted to the authorized rate of return if it meets the burden of demonstrating that the OIR plan would yield confiscatory rates even with the lower rate adjustment. Any such tariff filing would "be subject to special scrutiny and a high probability of suspension and investigation." (Id.)

As USTA sees it, paragraph 23 of the Report and Order contemplates two types of mid-course filings for the OIR plan. Under the first type of filing, a LEC can adjust its rates to the lower earnings band upon a showing that its current rates yield a return below the lower earnings limit, and will continue to do so until the end of the tariff period. No "heavy burden" would apply to such a filing. Under the second type of mid-course correction, a LEC would have to overcome a "heavy burden" in order to reset its rates to yield the prescribed rate of return, an adjustment that would be larger than that required to reach the lower earnings limit.

While this distinction appears to be clear-cut, there is language elsewhere in the R&O which clouds the distinction between mid-course corrections to the lower earnings limit, and mid-course rate adjustments designed to yield the authorized rate of return. For example, at ¶ 31 of the Report and Order, the Commission states that it is "imposing a burden of proof that rates are unreasonable for mid-term corrections" without distinguishing between the types of mid-term corrections. Similarly, the R&O states at ¶ 56 that the Commission has "necessarily established a higher burden for mid-term filings," again without distinguishing between the two kinds of mid-course corrections. To avoid potential confusion, USTA requests that the Commission clarify the R&O by stating that the "heavy" or "higher" burden applies only to mid-course filings adjusting rates to the prescribed rate of return, and does not apply to mid-term filings intended to yield a return at the lower earnings limit of the OIR plan.

2. The Commission Should Clarify That Carriers Which Elect the OIR Plan Effective January 1, 1994, May Exit the Plan After Two Tariff Periods.

New rule Section 61.50(d) requires that OIR carriers stay under the plan for a minimum of "two, two-year tariff periods." (R&O, App. B, § 61.50(d))[17] New rule Section 69.3(j), however, provides that LECs who participate in the OIR plan effective January 1, 1994, shall file initially for an 18-month tariff period. (R&O, App. B, § 69.3(j)) Read together, these two rules would require a LEC participating in the OIR plan effective January 1, 1994, to remain under the plan for a minimum 5 1/2-year period -- 18 months for the initial tariff period, plus the required "two, two-year tariff periods."

This result appears to be unintended. Accordingly, the Commission should clarify that a LEC entering the OIR plan effective January 1, 1994, must stay under the plan for a minimum of two tariff periods with the 18-month initial period counting as one of the two periods.

[17] Paragraph 70 of the Report and Order also establishes "four years, or two tariff periods, as the minimum for participation in the incentive plan."

3. **The Rules Should Provide for Exogenous Cost Treatment Under the OIR Plan.**

The Commission states that LECs under the OIR plan can recognize exogenous cost changes, as defined by the price cap rules, and incorporate these changes into their rates, either in the biennial tariff filing or as exogenous costs occur during the two-year tariff period. (R&O, ¶ 55) The new rules, however, make no mention of exogenous costs. As a matter of clarity, the Commission should incorporate the following paragraph into new rule Section 61.50:

> § 61.50 . . .
>
> *　　　　*　　　　*
>
> (l) Local exchange carriers subject to this section shall file, either at the beginning of or during the biennial tariff period, tariff revisions that reflect the impact on rates resulting from exogenous cost changes as defined in § 61.45(d)(1).

4. **The Rule Covering the Carrier Common Line Demand Adjustment Should Be Changed to Accurately Reflect the Commission's Intent.**

The Commission adopted a "common line formula that uses the historical growth in [total] common line minutes of use, divided by two, to compute carrier common line rates." (R&O, ¶ 60) This carrier common line demand adjustment formula will apply to both OIR plan carriers and LECs filing common line tariffs pursuant to Section 61.39.

The statement of this formula, however, in both Sections 61.39 and 61.50, does not reflect the Commission's intent. (R&O, App. B, § 61.39(b)(3) and (4), and § 61.50(k)) For example, the rules do not indicate the division of the common line minutes by two as set forth in the R&O.[18] To correct this omission and otherwise make the rules easier to comprehend, USTA suggests that the Commission adopt the recommended wording set forth in the attachment to this petition, in place of the current versions of Sections 61.39(b)(3) and (4), and Section 61.50(k).

5. The Rules Should Make Clear That Baseline Carriers May File on an Annual Basis.

The Report and Order (¶ 102) provides that baseline carriers (but not NECA) are to file their tariffs every two years, but may, at their option, file on an annual basis. Amended rule Section 69.3(a), however, states that "a tariff for access service shall be filed with this Commission for a two-year period." (R&O, App. B, § 69.3(a)) The rule should be modified to make clear that a carrier filing an access

[18] The rules also base subsequent period common line demand adjustment on 12-month data, rather than on total data since the last tariff filing. See discussion at Section II.A.1., supra.

tariff pursuant to Part 69 has the option to file its tariff for annual period.[19]

6. Section 61.50 Should Provide for End User Common Line Charges That Are Based on the Same Historical Data Used to Support These Rates Under Section 61.39.

Section 61.50 makes no mention of how an OIR plan carrier is to base its calculation of the End User Common Line (EUCL) charge. In contrast, amended Section 61.39(b)(5) states that for EUCL "charges included in a tariff pursuant to this Section, the local exchange carrier must provide supporting information for the two-year historical period with its letter of transmittal. . . ."[20]

For purposes of clarification, USTA recommends that the Commission include the same language, concerning the necessary information to support calculation of the EUCL charges, in Section 61.50 as it did in Section 61.39(b)(5). Such clarification would be appropriate because, given the similar nature of the two regulatory plans set forth in Sections 61.39 and 61.50, there is no reason to treat the EUCL calculation differently under the two sections. Both the OIR plan under Section 61.50 and the small company

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[19] The rule should state, however, that NECA's tariff shall be filed on an annual basis.

[20] R&O, App. B, § 61.39(b)(5).

filing option under Section 61.39 are historical-based regulatory plans, and both provide their incentive through the lag inherent in a 2-year tariff period. A consistent method of calculation of EUCL charges would reflect these fundamental similarities between the two plans.

7. **The Rules Make Reference to a Non-existent Paragraph.**

New rule Section 61.50(h)(1) references paragraph (c)(4) of the same section. (R&O, App. B, § 61.50(h)(1)) Paragraph (c)(4), however, does not exist in Section 61.50. Accordingly, the Commission should correct this error.

III. CONCLUSION

The regulatory plans adopted in this proceeding go a long way toward bringing the benefits of incentive regulation to smaller telephone companies and their customers. The issues raised in this petition are intended to fine-tune these plans so that they can achieve fully the Commission's stated objectives. For the reasons stated in